MAR 25 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 656

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Shareholders' Protective Committee's and Long Beach Federal Savings and Loan Association's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

and

Motion for Order Permitting Consideration of Petitions for Certiorari Without Printing of Additional Record.

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IN THE

Supreme Court of the United States

October Term, 1953

No. .....

(Nos. 12575, 12893 and 13055-CCA-9)

MALLONEE, *et al.*, as the Shareholders' Protective Committee, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Petitioners and Appellants,

vs.

AMMANN, Conservator, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, HOME LOAN BANK BOARD, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Respondents and Appellees.

Motion for Order Permitting Consideration of Petitions for Certiorari Without Printing of Additional Record.

To: The Honorable Justices of the United States Supreme Court:

The motion of Mallonee, Bucklin and Fergus, as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association, and Long Beach Federal Savings and Loan Association, respectfully shows:

1. Prior United States Supreme Court Decisions and Mandate.

That actions have been pending in the United States District Court for the Southern District of California since 1946. Such actions include Mallonee, *et al.* v. Fahey, *et al.*, No. 5421-P.H. That said actions were the subject of prior appeals and writs to this Honorable United States Supreme Court in 1946 and 1947, Nos. 687 and 133 Misc., October Term 1946, resulting in the opinions of *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030 (decided June 23, 1947), and *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (writ denied June, 1947).

That in 1948, several appeals (subsequent to said United States Supreme Court decisions) were taken by respondents to the United States Court of Appeals for the Ninth Circuit, and thereafter dismissed.

That in 1950, applications by respondents for writs of prohibition, injunction, etc., attacking the jurisdiction of said United States District Court were denied by said Court of Appeals.

That in 1952, in opinions reported in 196 F. 2d 336, and 200 F. 2d 420, said Court of Appeals reversed a preliminary injunction and an award of attorneys' fees.

That certiorari of said last two decisions was denied by this Court in May of 1953.

2. Voluminous Records on Appeals Have Been Printed on Previous Appeals.

That the record on appeal in said proceedings has become extremely bulky and voluminous. That considerable portions of said record have been printed on previous appeals and proceedings.

3. 1953 Seven-page Opinion of Court of Appeals Based Solely on Lack of Jurisdiction.

That the November, 1953 opinion of the Court of Appeals, certiorari of which is herewith sought, is decided solely on the question of jurisdiction of the District Court, a matter of law which petitioners believe can be adequately presented without necessity for printing of additional record on appeal.

Petitioners have incorporated certain matters of record in an appendix to their certiorari petitions. Petitioners believe this method of presentation will spare the Supreme Court from any necessity to search through the voluminous record.

4. Court of Appeals Ruled Without Printing of Record (Except on One Appeal).

In its seven-page opinion, the Court of Appeals decided questions of jurisdiction only, and did not consider either the merits or the facts. Six appeals were thus decided without printed records (except in one appeal).

What petitioners believe to be the fundamental error, *i. e.*, the question of jurisdiction of the District Court, is principally a question of law.

5. Efforts to Stipulate to Record for Certiorari.

Petitioners have sought stipulations from counsel for respondents that no additional record need be printed. Respondents have stated they believe the matter should properly be brought before the United States Supreme Court by motion rather than stipulation, but that respondents also desire to avoid additional printing of record for certiorari and would not oppose such motion.

WHEREFORE, petitioners respectfully pray an order of this Honorable United States Supreme Court that petitions for certiorari may be considered by the Court, upon the record from the Court of Appeals and the District Court without necessity for printing additional record.

Dated: March 23rd, 1954.

Respectfully submitted,

WYCKOFF WESTOVER,
Attorney for Petitioner Mallonee, et al., Shareholders' Protective Committee;

CHARLES K. CHAPMAN,
Attorney for Petitioner Long Beach Federal Savings and Loan Association.

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Shareholders' Protective Committee's and Long Beach Federal Savings and Loan Association's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Mallonee, Bucklin and Fergus, Shareholders' Protective Committee, and Long Beach Federal Savings and Loan Association, pray that writs of certiorari issue to review the orders and judgments entered November 23, 1953 (rehearing petitions denied December 28, 1953), in

Appeal Nos. 12575, 12893, and 13055, in the United States Court of Appeals for the Ninth Circuit, entitled:

Appeal Nos. 12575, 12893, and 13055

JOHN H. FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

RONALD WALKER, Special Master, *et al.*,

Appellees.

and respectfully represent as follows:

Opinions Below.

The 7-page opinion in these Appeals, Nos. 12575, 12893, and 13055, will be found in Adv. Fed. 2d, Vol. 208, at page 197, No. 2, issue of January 25, 1954. It is also pages 4 to 12 of the Appendix filed herewith.

Jurisdiction.

Jurisdiction of this United States Supreme Court is invoked:

(a) Under Title 28, United States Code, Section 1254, and

(b) Under Section 1253.

The original action was commenced by a complaint based upon allegations that Acts of Congress were unconstitutional, and demanding an accounting. Upon the application for injunction, under Section 380(a) of Title 28, United States Code, as it existed in 1946 (now Title 28, United States Code, Sec. 1253), a three-judge statutory Court was convened.

By direct appeal in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, and by original proceedings (writ of prohibition, etc.) in *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (1947), respondents attacked the jurisdiction of the District Court.

The United States Supreme Court decided part of the constitutional questions, denied the writ, and remanded the case to the District Court for further proceedings. Upon such remand the District Court entered several final judgments, including judgment that respondents make "a full and complete accounting."

Appeals were taken and dismissed from certain of these judgments. The balance became final judgments from lack of appeal.

In 1950, the Court of Appeals also denied respondents' applications for writs of prohibition, etc.

Jurisdiction of the District Court.

Jurisdiction was originally invoked in May and July, 1946, under:

(a) Old Title 28, United States Code, Section 380(a), and Section 118 (now Sec. 1655), by the Shareholders' Protective Committee, representatives of the class of 16,000 depositors, seeking preliminary and permanent injunctions based upon unconstitutional Acts of Congress, and an accounting;

(b) Old Title 28, U. S. C. A., Section 41(26) (now Secs. 1335, 1397 and 2361), through interpleader by deposit into the registry of the District Court of titles to, and payments upon, the homes of approximately 8,000 borrowers from the seized mutual savings association.

Over $14,000,000.00 of assets remain on deposit in the registry of the District Court, subject to pending foreclosure actions brought by respondents.

The District Court entered final judgment against respondents for "a full and complete accounting" to petitioners. (14 F. R. D. 273, at 320.) No appeal was ever taken from such final judgment. Respondents expressly consented (by written approval) to the District Court's order, appointing their own former attorney as Special Master to assist the Court in the accounting.[1]

Their first accounting was rejected by the District Court. (See Appx. p. 23.) Unable to account, respondents attacked the jurisdiction of the District Court, and appealed from interim non-appealable orders allowing fees to the Special Master for, among other things, hearing said accounting.

The Court of Appeals has reversed such non-appealable orders and held the District Court without jurisdiction.

Questions Presented.

1. Does enforcement of a final United States Court judgment against a Federal conservator for "a full and complete accounting" to shareholder-depositors who charge such conservator with fraudulent falsification of records and misappropriation of their seized savings, "present no justiciable controversy within the jurisdiction of the Federal Court" and require "functions beyond the power of the District Court to undertake"?[2]

---

[1]See Signature Plate opposite this page.

[2]The Court of Appeals has so held in its opinion, page 8 of Appendix.

The undersigned hereby consent to and approve the foregoing Order.

Westover and Smith
by Wyckoff Westover - attorneys for the Plaintiffs - Petitioners

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Fed Farms Corp

James Mc Carter
US ATTORNEY

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FOR HOME LOAN BANK BOARD

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John Wright

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The undersigned hereby consent to and approve the foregoing Order.

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John Wright
Attys for said party Defendant
and Resp. claiming adverse
Home Loan Bank of Los Angeles

Raymond Cremaring
Atty for Defendant Claimant
Robert A. Wallis

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2. Can a Court of Appeals entertain appeals from orders expressly interim and not final under F. R. C. P. 54(b), and upon such appeals, reverse the non-appealable orders and thereby prevent enforcement of five-year final United States District Court judgments from which no appeals were ever taken?

Statutes Involved.

(a) The Federal Savings and Loan Association creative sections of the Home Owners' Loan Act of 1933, 48 Stat. 128, Title 12, United States Code, Section 1461 *et seq.;*

(b) The Administrative Procedure Act (U. S. C. A., Title 5, Secs. 1001 to 1011, incl., Public Law 404, 79th Cong., Chap. 324, 2nd Sess.), as applied to Federal conservator's accounting for seized savings upon the demands of depositors, who charge fraudulent falsification of accounts and misappropriation of the seized savings;

(c) The Federal Savings and Loan Insurance Corporation creative sections of the National Housing Act, 48 Stat. 1246, Title 12, United States Code, Section 1724 *et seq.;*

(d) The application of the interpleader statutes (old Title 28, U. S. C., Sec. 41(26), new Title 28, U. S. C., Secs. 1335, 1397, and 2361) to Federal Home Loan Banks, conservators appointed by Home Loan Bank Board and Federal Savings and Loan Insurance Corporation, as receiver, or otherwise;

(e) The Federal Home Loan Bank Act, 47 Stat. 725, Title 12, United States Code, Section 1421, *et seq.;*

(f) Federal Rules of Civil Procedure, Rules 53(a) and 54(b).

Statement.

Respondents Refuse to Account for $26,000,000.00 of Uncounted Cash and Securities, Seized Without Receipts.

In May of 1946, respondent conservator, without notice, hearing, or trial summarily seized $26,000,000.00 of uncounted cash, bearer bonds, and negotiable securities, together with all accounting records and books concerning the same. (14 F. R. D. 273, at 280, 303.) The seized assets were the savings deposits of 16,000 (14 F. R. D. 273, at 303) mutual shareholder-owners of Petitioner Long Beach Federal Savings and Loan Association, a mutual Federal Savings Institution.

Petitioner Savings Association's officers demanded receipts for, and an independent count or audit of, the uncounted cash, bearer bonds, and negotiable securities. (See Appx. p. 45.)

Respondent conservator refused to give any receipts or to permit any independent audit. (See Appx. p. 45.)

Depositors Sue for Accounting.

Seven days after the seizure, petitioners Mallonee, *et al.*, commenced the within class action on behalf of themselves and all 16,000 mutual shareholder owners of the seized savings deposits. (14 F. R. D. 273, at 280.) Their original complaint alleged the seizure violated the United States Constitution; the complaint sought return of petitioner's seized savings *and an accounting*. (See Appx. p. 14.)

September 30, 1946, a statutory[3] three-judge Court at Los Angeles, California, held the seizure unconstitutional,

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[3]Then Section 380(a) of Title 28, United States Code, as it existed in 1946 (now Title 28, U. S. C., Sec. 1253).

ordered the removal of the conservator, the return of the seized assets, *and an accounting.*[4]

Respondent conservator, *et al.,* appealed to the United States Supreme Court, and also sought prohibition, mandamus, etc., against the United States District Court, claiming lack of jurisdiction.

United States Supreme Court Refuses Prohibition.

In June, 1947, the United States Supreme Court, in *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, refused prohibition and mandamus, but, in *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, reversed the judgment of the three-judge court and held constitutional the Act of Congress under which the seizure had been made.

Petitioners had charged the summary seizure to have been made maliciously and in bad faith.

The United States Supreme Court, in June, 1947, said in 332 U. S. at page 247:

> ". . . The complaint alleged that the Conservator and the Chairman had seized the property without due process of law, motivated by malice and ill will, and that the seizure for various reasons was in violation of the Constitution . . ."

Further, at page 257:

> "It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the

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[4] *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245. At page 248, the Supreme Court said: "The three-judge court . . . ordered the Conservator to account . . ." See also, 68 Fed. Supp. 418 for opinion of three-judge court.

supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, . . ."

The United States Supreme Court Mandate to the District Court said:

"AND IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the said District Court for proceedings in conformity with the opinion of this Court."

Respondent Bank Board Orders Accounting.

In August of 1947, the President reorganized the seizing agency from a one-man commissioner to a three-man Board.[5] One of the first official acts of the reorganized Board was to rescind the order appointing respondent conservator, require him to restore the remnants of the seized savings deposits, and to file "a full and complete accounting" with the United States District Court. Respondent Board's order said in part:

". . . that the Conservator . . . is hereby . . . . directed to deliver all of the aforesaid assets, records and books of any and every nature to said shareholders through their authorized representative and to make a full and complete accounting to said shareholders for all assets and liabilities of any and every nature pertaining to said Association, and a

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[5]When created by Act of Congress, the Federal Savings authority was vested in a five-man Federal Home Loan Bank Board. During the war emergency, such authority had been reorganized into a one-man administration. The 1947 Presidential reorganization restored a bi-partisan board, but with three members instead of the original five. (Reorganization Plan No. 3 of 1947, 12 F. R. 4981.)

copy of such accounting be filed with the District Court of the United States, in and for the Southern District of California."[6]

Respondent Board's order, by its terms, required that a certified copy of such order be filed with the United States District Court. The certified copy of said order was so filed. (14 F. R. D. 273, at 285-305.)

Necessity for Accounting.

When seized, petitioner mutual Federal Savings Association was not indebted to any Federal agency, was completely solvent, had a surplus of over $1,300,000.00, and was highly liquid. (14 F. R. D. 273, at 280-287.)

Of its $26,000,000.00 in assets, over half, or nearly $14,000,000.00 was in cash, bank deposits, and United States Government bearer bonds. (See Appx. p. 54.)

Upon seizure of petitioner Savings Association, respondent conservator mailed to each of its 16,000 mutual depositor-owners a statement alleging mismanagement and misappropriation by the removed officers and directors.

A run of withdrawals immediately ensued. Over $10,000,000.00 was withdrawn by the terrified savings depositors. Withdrawals amounted to from $1,000,000.00 to $2,000,000.00 a day. (14 F. R. D. 273, at 292.) The run came to an abrupt halt when the United States Courts enjoined respondent conservator from merging the seized savings association, or commingling its seized assets with

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[6]Home Loan Bank Board Order No. 388 of January 17, 1948, text in full is set forth at pages 15 to 16 of Appendix.

other institutions. (14 F. R. D. 273, at 292; see also, Appx. p. 95.)

In January, 1948, after twenty months of conservatorship, respondent conservator returned to the founding management, less than one-fourth of the $26,000,000.00 in assets he had seized, and for which he had refused to give any receipts. (See Appx. pp. 20, 59.)

$7,000,000.00 Debt Fraudulently Created by Respondents.

The savings association, free of debt when seized, was alleged to have become indebted, during the conservatorship, for $6,300,000.00[7] of alleged borrowings by the conservator. About $10,000,000.00 of the seized assets are claimed to have been used to pay withdrawals during the run. This left a $16,000,000.00 remnant of which more than $13,000,000.00 was missing from the Association's premises. (See Appx. pp. 20, 59.) Respondents claim to have pledged part of this as security for such conservator's debt. (See Appx. pp. 21, 60.)

An action to foreclose such $7,000,000.00 conservator's debt against Petitioner Association and shareholders is now pending in the United States Court at Los Angeles, California. The foreclosure complaint filed by respondent Federal Home Loan Bank of San Francisco with the alleged approval of respondent Bank Board, does not even name the removed conservator, the sole signer of the notes, as a defendant. [See C.C.A.-9 Trans. No. 10, p. 2.] Although ordered by the United States District Court so to do, respondents have refused to make such

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[7]Accrued interest is alleged to amount to approximately $700,000.00; such interest and principal combined, total $7,000,000.00.

conservator a party to their own foreclosure complaints. [See C.C.A.-9 Trans. No. 10, p. 2.]

Petitioners shareholders and association are resisting respondents' foreclosure of their seized savings. Petitioners defend on the grounds, among others, that the loan transactions were falsified; that required authorizations and approvals were never obtained; that fraudulent and back-dated sham approvals have been entered in official records by respondents to conceal the non-existence of required authorizations for the $6,300,000.00 loan, that no consideration or value was ever received by the Association or its shareholders for the alleged conservator's $7,000,000.00 debt. (See Appx. pp. 19, 22, 57, 63.)

Respondents have twice filed inadequate and unintelligible attempted accountings with the United States District Court.

The first of such accountings was, after hearing, rejected by the United States Court. (14 F. R. D. 273, at 287-288, and see Appx. p. 23.)

Respondents sought, and obtained from the Court, leave to supplement their first inadequate accounting. (See Appx. pp. 32, 27.)

But neither the first, nor the supplemental accounting discloses any basis or substantiation for approximately $160,000.00 in "conservator's expenses," charged or paid by respondent conservator and Bank Board to themselves, from the seized savings deposits of petitioners. (See Appx. pp. 18, 46.)

During their twenty months' administration of the seized Federal Savings Association and its mutual depositors' savings, respondent conservator claims to have

made between $5,000,000.00 and $6,000,000.00 of new loans upon F. H. A., V. A. or other Government insured security. Such claimed insurance is void because of falsification by respondent conservator of the loan applications. (See Appx. p. 37.)

Depositors Object to Respondents' Accountings on Grounds of Fraudulent Falsification of Records and Misappropriation of Seized Savings.

Petitioner Association and its shareholders' Committee's objections to the accountings charge:

(a) That the $6,300,000.00 of conservator's borrowing (together with $700,000.00 claimed accrued interest) is false, fraudulent and non-existent. That no consideration was received by said Association or its shareholders for the creation of such denied debt. That required authorization and approval for incurring such debt was non-existent and that to cover absence of such required approvals, respondents falsified and back-dated sham approvals. (See Appx. pp. 19, 22, 57, 63.)

(b) That respondent conservator knowingly falsified statements of title condition in the applications for Government insurance of said $5,000,000.00 to $6,000,000.00 of F. H. A. and V. A. loans and that as a result, such Government insurance of said loans is void and non-existent, and said loans are therefore illegal assets for petitioner Federal Savings and Loan Association to own. (See Appx. p. 37.)

(c) That original accounting records, evidencing multi-million dollar transactions of said Association's business, are missing from said Association's premises, removed by respondent conservator or others. Although twice ordered

by the Court so to do, respondents have refused to list or itemize the files, documents, or accounting records they seized. (See Appx. p. 61.)

Over $1,000,000.00 original cancelled checks and one uncashed $100,000.00 check were missing from the Association for over four years after removal of respondent conservator.

Respondents refused to account for, and denied any knowledge of, such 135 missing checks, but in September of 1952, an Assistant United States Attorney delivered them to the Court claiming "they were found in the safe of the office of the United States Attorney." (See Appx. pp. 70, 77.)

(d) That the conservator's bank accounts were created and maintained in violation of law and regulations. That such violation was intentional so as to preclude any audit or verification of the conservator's dealings with petitioners' seized savings. (See Appx. p. 48.)

These are but a few of the many similar multi-million dollar objections to respondents attempted accountings, based upon charges of deliberate falsification, misappropriation and personal corruption. Such objections are pending, awaiting trial before the United States Court at Los Angeles, California.

Court Appoints Special Master to Assist in Accounting.

In January, 1948, the United States Court made its final judgment removing respondent conservator from possession of the seized Savings Association, ordered return of the remnants of the seized assets, and required respondents to file "a full and complete accounting." (14 F. R. D. 273, at 315-321.)

At the same time, by separate order, the Court appointed, as the Court's Special Master, respondent conservator's then attorney, Assistant United States Attorney Ronald Walker. [R. 3, Appeal 12575.]

The appointment of such Special Master was expressly consented to by all respondents.[8]

No appeal was ever taken from the final judgment requiring the accounting, nor from the appointment of respondents' own attorney as the Court's Special Master.

Years passed. The Board finally filed its accountings with the Court. The Special Master held hearings on the accounting and other matters, filed interim reports, and received interim allowances on account of fees. [C.C.A.-9 Trans. No. 2.] No appeals were ever taken from any of these proceedings.

But, in 1950, the United States Court rejected respondents' first inadequate accounting. (See Appx. p. 23.) Respondents appealed from the next, and all further, allowances of fees to the Special Master.[9]

Court of Appeals Reverses Non-appealable Orders.

The orders allowing the fees were interim only, were not final under F. R. C. P. 54(b), and by their terms expressly provided:

> "This is an interim order and is not a final determination of the issues material to the claim for fees for said Special Master as contemplated by Rule

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[8]See photo copy of signatures of respondents' attorneys, opposite page 4.

[9]There were four such appeals, Nos. 12575 (two appeals), 12893, and 13055, in the Court of Appeals.

54(b) FRCP, and the Court reserves the power to modify, alter or amend this order at any time."

Such orders were neither final nor appealable.[10] Respondents nevertheless appealed.

This and three similar appeals from other allowances to the Special Master remained pending undecided before the Court of Appeals from January, 1950 to November, 1953. [C.C.A.-9 Trans. No. 2, p. 5.]

Petitioners and the Special Master, in October, 1951, moved the Court of Appeals to dismiss the four pending appeals from the non-appealable orders. [C.C.A.-9 Trans. No. 2.] The motions to dismiss remained under submission with the Court of Appeals for over two years, until in November, 1953, the Court of Appeals denied the motions to dismiss the appeals, reversed the non-appealable orders and remanded to the District Court with instructions to vacate the orders appealed from.

Court of Appeals Refuses to Consider Merits.

Such summary reversal was on motions of respondents. The appeals were never briefed nor argued, nor was any printed record made [except in Appeal 12575; C.C.A.-9 Trans.]

The Court of Appeals refused to consider the merits.

Respondents, conservator, *et al.*, did not object either in the District Court, nor in the Court of Appeals, to the merits of the rendition of services of the Special Master, their own former attorney, nor the value of his services, nor to the reasonableness of the amounts allowed.

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[10]See Section K, page 40, hereof, "THE ORDERS APPEALED FROM ARE NOT FINAL OR APPEALABLE. THE COURT OF APPEALS IS WITHOUT JURISDICTION."

Their attack was based solely on the alleged lack of jurisdiction of the United States District Court to appoint a Special Master, or to decide the disputed accounting. [C.C.A.-9 Trans. No. 6, pp. 1-3.]

Respondents' attack on the jurisdiction of the United States Courts is based upon an alleged failure of petitioners to exhaust administrative process in 1946, before commencing the action. But their Order No. 388, in January, 1948, was *final* administrative action.

It removed respondent conservator, restored part of the remnants of the seized savings deposits, required respondent conservator to account with petitioner shareholders, and to file such accounting with the United States District Court. (14 F. R. D. 273, at 285.)

The order, by its terms, required that a certified copy of the order be filed with the United States Court, in these proceedings. Such was done. (14 F. R. D. 273, at 285.)

Respondent Conservator's Surety Bond Filed With United States District Court for Enforcement.

Respondents themselves delivered to the Special Master, who has filed with the Court, the $100,000.00 surety bond, furnished by respondent conservator upon his appointment, and held by respondent Board until the first attempted accounting. [Appeal 12575, R. 259-260.]

Delivery of the conservator's surety bond to the Court with the first accounting demonstrates that the administrative process was concluded.

No power exists in respondent Home Loan Bank Board to render money judgments or enforce execution against anyone, least of all, the bonding company on respondent conservator's $100,000.00 bond.

Board Action on Accounting Final and Concluded.

Respondent Board contemplates no further administrative action on the accounting.

In January, 1954, in opposing substitution of successor of Board members, an affidavit of W. W. McAllister, Chairman of respondent Board, was filed with the United States District Court. Such affidavit read in part:

> ". . . that Ammann as conservator has never refused to make an accounting in accordance with Home Loan Bank Board regulations and requirements *but has in fact made such accounting;* . . ."[11]
> (Emphasis added.)

Respondent Bank Board's 1948 order requiring "a full and complete accounting" was final. It has never been revoked or modified.

The United States District Court, in January, 1948, made its final judgment requiring respondents to make "a full and complete accounting." (14 F. R. D. 273, at 320.) Such Court order was never appealed, nor has it been modified or reversed.

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[11]The full text of such affidavit will be found at pages 68 to 69 of the Appendix.

Both Board and Court action are six years or more final.

But the Court of Appeals in 1953, holds that requiring a Federal conservator to account for seized savings deposits are:

> ". . . functions which it has now been determined were beyond the power of the District Court to undertake . . ."

Thereby, Federal conservators who seize millions in uncounted cash and bearer bonds are alone, of all fiduciaries, rendered immune from the inherent power of the United States Courts of equity to compel an accounting and to surcharge for shortages upon the demand of the defrauded beneficiaries.

Specifications of Error.

The Court of Appeals erred when it:

1. Held enforcement of final judgments for accounting against respondents, conservator, *et al.*:

> ". . . present no justiciable controversy within the jurisdiction of the Federal Court, . . . [and are] . . . functions . . . beyond the power of the District Court to undertake."

2. Entertained appeals from orders which, by their terms, were not final nor appealable under F. R. C. P. 54(b).

3. Reversed such non-appealable orders and thereby prevented enforcement of previous five-year final judgments requiring accounting, from which final judgments no appeals were ever taken.

REASONS FOR GRANTING THE WRIT.

A. Public Interest.

The decision of the Court of Appeals creates a dangerous monster, a branch of the executive power of the United States, now authorized to seize millions of uncounted cash and bearer securities and liable to account to no one for what it seizes or for its disposition of the seizures.

The property thus endangered is more than ten billion* dollars of savings deposits. The people whose savings are thus exposed to summary confiscation are the twelve million* savings depositors who have entrusted the savings of their lifetime of toil to the more than fifteen hundred* Federal Savings Association members of the Federal Savings System, created by Congress to "encourage local thrift and local home ownership."[12]

Their average savings deposit is less than $1,000.00* each.

The power to seize and never account (either for what was seized or the disposition made of the seized savings) is a direct violation of the Fourth and Fifth Amendments to the United States Constitution.

Such decision of the Court of Appeals is of first impression. The United States Supreme Court has never decided that conservators for Federal Savings Associa-

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[12]Home Owners' Loan Act of 1933, Title 12, U. S. C. A., Sec. 1464.

*All figures are approximate. Figures are from reports to Congress of Home Loan Bank Board, General Accounting Office, Federal Savings and Loan Insurance Corporation, and similar sources.

tions are immune from accounting to the United States Courts on demand of the depositors whose savings such conservators seize.

B. Respondent Conservator Is a Trustee Charged With Fraud Who Must Fully Account.

The seized $26,000,000.00 of uncounted cash, bearer bonds and negotiable securities are not the property of, nor owned by, respondents conservator or Bank Board.

It represents the deposited savings of 16,000 *mutual* shareholders of the petitioner Federal Savings Association. *Not one dollar of it is Government money.* The 16,000 shareholders are its mutual owners. (See Appx. p. 19.)

Eight years ago the shareholders (through their elected officers) demanded receipts for, and independent audit of their seized uncounted cash, bearer bonds and negotiable securities. (See Appx. p. 45.)

Respondent conservator refused to give any receipts, or permit such independent audits. (See Appx, p. 45.)

Eight years ago, petitioner Shareholders' Committee, representing the 16,000 mutual owners of the seized savings, sued respondents for an accounting. (See Appx. p. 14.)

Petitioners' charges of fraudulent falsification in the creation of a $6,300,000.00 conservator's debt, of total absence of consideration for such debt, of fraudulent falsification of the title condition of property, security for $5,000,000.00 to $6,000,000.00 of F. H. A. and V. A. loans, made by the conservator with petitioners' seized savings, of theft or concealment of accounting documents and records, of unauthorized and unsubstantiated pay-

ments and charges of over $160,000.00 for "conservator's expense," of deliberate illegality in the manipulation of the conservator's bank accounts to prevent audit or verification,[13] are all charges of fraudulent falsification of records (see Appx. pp. 57, 19, 22, 64, 37, 61, 18, 46, 48) and dishonesty, which are violations of the criminal statutes of the United States.[14]

Petitioners' demands for an accounting upon such charges, are met by objections to the jurisdiction of the United States Courts to enforce the Court's final judgment for such accounting.

Respondents have filed thousands of pages comprising tens of thousands of items, as their purported accounting, but they refuse to comply with the United States Court's order to account on the matters exclusively within their own sole knowledge, including how much they paid themselves for "conservator's expense." (14 F. R. D. 273 at 287.)

Unable to meet the requirements of a United States Court for "a full and complete accounting," they attack the jurisdiction and authority of any Court to require them to account.

Their counsel said to the United States Judge at Los Angeles [Tr. Oct. 21, 1953, p. 763]:

> "The Court: That would be the end of the accounting if he just said, well, I got $500,000 and

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[13]These are but a few of the multitude of similar multi-million dollar objections of petitioners to respondents' attempted accounting.

[14]False and fraudulent statements, writings, or documents, made or used, "Within the jurisdiction of any Department or Agency of the United States . . ." are felonies (Title 18, U. S. C., Sec. 1001); as is the affixing of the Seal of such Department or Agency to such fraudulent matter. (Title 18, U. S. C., Sec. 1007.)

I threw it down the rathole? Nobody could say anything about it?

Mr. Silverman: I don't think anyone could.

The Court: You do not think anyone could?

Mr. Silverman: No, sir." (See Appx. p. 13.)

Thus is presented the fundamental question—can a Government fiduciary refuse to account for seized savings deposits upon the demand of the mutual depositors, owners of the Federal Savings Association, who charge fraudulent falsification, misappropriation and dishonesty in the handling of their seized savings deposits?

In *Baker v. Schofield,* 243 U. S. 114, 61 L. Ed. 626 (1917), the Court said (speaking of a National Bank Receiver) at page 119 of the U. S.:

> "That the secret arrangement between Baker and Simpson was fraudulent and a gross breach of the receiver's duty is too plain to require detailed consideration . . . [Citing Authorities.]
>
> ". . .
>
> ". . . Under such circumstances, the trustee . . . can be compelled to restore the property to the authorized representative of the trust estate."

In *Mosser v. Darrow,* 341 U. S. 267, 95 L. Ed. 927 (1950), the Supreme Court said at page 274 of the U. S.:

> ". . . But a trusteeship is serious business and is not to be undertaken lightly or so discharged. The most effective sanction for good administration is personal liability for the consequences of forbidden acts, . . ."

In *Phelan v. Middle States Oil Corp.*, 154 F. 2d 978 (C.C.A. 2, 1946), the Court of Appeals said at page 991:

> ". . . A receiver who has strayed from his duty to the injury of anyone interested in the estate can and should be surcharged . . . The rule that a receiver must not be motivated by personal considerations is prophylactic; its sanction is a surcharge . . . [Citing Authorities.]"

See also:

Woods v. City Nat. Bank, 312 U. S. 262, 85 L. Ed. 820 (1941);

United States v. Howard, 302 U. S. 445, 82 L. Ed. 352 (1938);

Crites v. Prudential Ins. Co. of America, 322 U. S. 408, 88 L. Ed. 1356 (1944);

Jackson v. Smith, 354 U. S. 586, 65 L. Ed. 418 (1921).

Although some Court of Appeals decisions[15] have held the general rule that a fiduciary must account with his beneficiary, inapplicable to National Bank receiverships, no case, until the present opinions of the Court of Appeals (certiorari of which is here sought), has held that a Government official can seize uncounted millions of cash and securities, at his pleasure return one-fourth (See Appx. pp. 20, 59), of the seized assets and refuse to account for, or answer charges of fraudulent misappropriation of, the balance.

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[15]*Cooper v. O'Connor*, 105 F. 2d 761, and 107 F. 2d 207; *Lucking v. Delano*, 122 F. 2d 21.

Presumptions of "official rectitude" cannot prevail to prevent enforcement of final orders of a Government agency and final judgments of a United States Court for "a full and complete accounting" after the United States Court has rejected the officials' first accounting as insufficient.

Surely justice cannot be so blind that it will not look at the accounting of a Government official ordered both by administrative order and Court judgment to account upon beneficiaries charges of falsification of records and misappropriation of seized savings.

C. Respondents' Administrative Order Submitted Accounting to Court for Adjudication.

More than six years ago, respondent Bank Board recognized its fiduciary duties, and by official Order No. 388, required respondent (its conservator) to make "a full and complete accounting" with the United States Court. Such order was:

> ". . . that the Conservator . . . is hereby . . . directed to deliver all of the aforesaid assets, records and books of any and every nature to said shareholders through their authorized representative and to make a full and complete accounting to said shareholders for all assets and liabilities of any and every nature pertaining to said Association, and a copy of such accounting be filed with the District Court of the United States, in and for the Southern District of California."[16]

Thereby, respondents themselves selected the Court below as the appropriate Court, and the within action as the ap-

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[16]For full text of Order see Appendix, pages 14-15.

propriate proceeding, for trial of the issues of the contested accounting.

Respondents' Order No. 388, by its terms, required that a certified copy thereof be filed with the Court below in these proceedings. Both the certified copy of such order and respondents' attempted accounting, were so filed with the Court (14 F. R. D. 273, at 285 and 305). (See Appx. p. 15.) Both were final administrative action and complete exhaustion of the administrative process concerning accounting.

Six years have elapsed since the making of Order No. 388. More than four years since the filing of the first attempted accounting with the Court.

The Court below entered its final judgment. No appeal was ever taken from that final judgment which, by its terms, required "a full and complete accounting."

But now respondents, unable to account, seek to escape their liability by attacks upon the jurisdiction of the United States Courts to compel compliance with the final judgment for "a full and complete accounting."

D. Respondents Are Not Immune From Suit for Accounting.

Respondent conservator by Home Loan Bank Board regulations (C.F.R. Title 24, Sec. 149.4(f)):

> "May, under the direction and supervision of the General Counsel of the Home Loan Bank Board, institute, prosecute, maintain, *defend,* intervene, and otherwise participate in any and all actions, suits or other legal proceedings by and *against the conservator* or association . . ." (Emphasis added.)

Such waiver of sovereign immunity exposes respondents to every judicial process.

See:

Keifer v. R. F. C., 306 U. S. 381, 83 L. Ed. 784 (1939).

F. H. A. v. Burr, 309 U. S. 242, 84 L. Ed. 724 (1940), wherein the Court said at page 245 of the U. S.:

> ". . . when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

And,

R. F. C. v. Menihan, 312 U. S. 81, 85 L. Ed. 595 (1941), wherein the Court said at page 85 of the U. S.:

> ". . . We think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits . . ."

"Judicial process" and "the usual incidents of suits" include accounting and surcharge for fraudulent misappropriation.

E. Administrative Procedure Act Nullified.

The Administrative Procedure Act[17] has been held by the same Court of Appeals in a prior opinion (196 F. 2d 336 at 381-383) to be applicable to this seizure and this litigation. At page 381, the Court said:

> ". . . legislation of the character of the A. P. A. [Administrative Procedure Act] is to be regarded as 'remedial' and 'procedural' and therefore applicable

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[17]United States Code, Title 5, Sections 1001 to 1011, inclusive.

> to pending actions . . . [citing authorities] . . . We agree with the rationale of these cases and hold that *after* September 11, 1946 the effective provisions of A. P. A. were immediately applicable to the pending suits . . ."

The final judgment (14 F. R. D. 273 at 315, 320) for accounting was entered January 23, 1948, *after* the effective date of "A. P. A." Such judgment was based upon final administrative action—respondent Board's Order No. 388, which required such final accounting to be made and filed with the United States District Court.

Such Act provides in part:

> (Sec. 1009, Title 5, U. S. C.)
>
> "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Petitioners "suffer legal wrong" within the meaning of said section when respondents charge, or pay, to themselves $160,000.00 from petitioners' seized savings, and refuse any itemization or disclosure of the basis for such payment. (See Appx. pp. 18, 46.)

Petitioners "suffer legal wrong" within the meaning of said Administrative Procedure Act when respondents seize petitioners' savings and obligate them to a fraudulent $7,000,000.00 debt, created by sham and falsified authorizations, and without consideration to petitioners. (See Appx. pp. 19, 22, 57, 63.)

Petitioners "suffer legal wrong" when respondents falsify statements of title condition, and thereby void

Government insurance of $5,000,000.00 of F. H. A. and V. A. loans, made from petitioners' seized savings. (See Appx. p. 37.)

But, in its 1953 opinion, the Court of Appeals holds that actions for accounting for such misappropriation of the depositors' seized savings:

> ". . . present no justiciable controversy within the jurisdicton of the Federal Court . . ."

and are,

> ". . . beyond the power of the District Court to undertake . . ."

In *American Bank v. Federal Reserve Bank of Atlanta,* 256 U. S. 350, 65 L. Ed. 983 (1921), the Court said at page 358 of the U. S.

> ". . . If without a word of falsehood, but acting from what we have called disinterested malevolence, a man by persuasion should organize and carry into effect a run upon a bank, and ruin it, we cannot doubt that an action would lie . . ."

Six years ago, in this same litigation, in *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, at pages 256-257, the United States Supreme Court said:

> "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies."

And remanded to the District Court for trial.[18]

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[18]Mandate United States Supreme Court, August 4, 1947, "And It Is Further Ordered that this cause be, and the same is hereby, remanded to the said District Court for proceedings in conformity with the opinion of this Court."

If accounting for fraudulent misappropriation of seized savings of 16,000 mutual shareholders is not one of the "remedies" to which the United States Supreme Court referred, petitioner-depositors, after eight years of struggling for an accounting for their seized savings, respectfully ask the Supreme Court—what, *if any,* are their remedies?

F. Court Has Both Inherent and Statutory Power to Appoint Special Master for Accounting.

The first attempted accounting filed by respondents was over 800 pages, and comprised more than 150,000 items. (14 F. R. D. 273, at 287.)

The need for a special master to assist the Court was obvious.

All United States Courts possess inherent power as Courts of equity to call to their assistance special masters, auditors, and similar judicial aides.

In the Matter of Walter Peterson, 253 U. S. 300, 64 L. Ed. 919 (1920), the Court said at page 312 of the U. S.:

> "Courts have (at least, in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties . . . From the commencement of our government, it has been exercised by the Federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, . . ."

Further, express statutory authority is conferred upon United States District Courts by F. R. C. P., Rule 53, to appoint special masters, auditors, etc.

Six years ago, respondents recognized the necessity of a special master to assist the Court in adjudication of their attempted accounting. Respondents expressly consented to the appointment of their then attorney (Ronald Walker, an Assistant U. S. Attorney at Los Angeles, California) as special master of the Court to assist the Court's decision of the sufficiency of respondents' accounting. Their consent was in *writing* by signature of their attorneys affixed to the Court's order [R. 3, Appeal 12575] appointing the master.[19] No objection was then made to the jurisdiction or authority of the Court to appoint the master or to hear and decide the accounting.

Administrative remedies and action were exhausted, conclusive and final. The accounting filed by respondents with the Court through their own attorneys was the culmination of the administrative process.

Court adjudication of the sufficiency of that accounting in the light of the shareholders objections was a judicial, not administrative, function.

Entry of judgment for surcharge, if the objections were sustained, and enforcement of the conservator's $100,000.00 surety bond, delivered by respondents themselves into Court for that purpose [Appeal 12575, R. 259-260] were judicial, not administrative functions.

No administrative authority can enter a money judgment or issue execution against anyone, last of all against such bonding company.

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[19]See Signature Plate opposite page 4 hereof for copy of Consent.

G. Exhaustion of Administrative Remedies Is Not a Prerequisite to an Action for an Accounting.

From the moment of seizure of petitioners' deposited savings, on May 20, 1946 (14 F. R. D. 273, at 280), statutes of limitations against action for recovery of the seized savings and for an accounting commenced to run.

The running of such statutes of limitations is neither suspended nor tolled by any administrative process or power. The filing of requests for administrative hearings, or the pendency of administrative proceedings does not extend the time for filing Court action.

In *Unexcelled Chemical Corp. v. United States of America,* 345 U. S. 59, 97 L. Ed. 821 (1953), in a unanimous opinion, this Court said (at p. 65 of the U. S.):

> ". . . A cause of action is created when there is a breach of duty owed the plaintiff . . . The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings . . . have been completed (Far East Conference v. United States, 342 U. S. 570, 96 L. Ed. 576, 72 S. Ct. 492; Thompson v. Texas Mexican R. Co., 328 U. S. 134, 90 L. Ed. 1132, 66 S. Ct. 937; General American Tank Corp. v. El Dorado Terminal Co., 308 U. S. 422, 84 L. Ed. 365, 60 S. Ct. 325; United States v. Morgan, 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795) is a matter of judicial administration and of no relevancy here. The statutory liability accrued when the minors were employed. It was from that date that the period of limitations began to run."

Statutes of limitation universally refer to accrual of a cause of action. None attempt to compute time when

the prospective plaintiff is under disability and unable to file any action in any Court.

California Code of Civil Procedure provides:

"CHAPTER I.

Time of Commencing Actions in General.

§312. [Commencement of civil actions.] Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, . . ."

California statutes of limitation are short (90 days to 5 years). All have long since expired.

But, statutes of limitation cannot run unless the action can be filed. Otherwise defendants, by delaying their administrative process, could prevent *any* action being filed until after expiration of the statute of limitations.

In this very case respondents have pled both failure to exhaust administrative remedies[20] and expiration of the statute of limitations.[21] They have claimed the action both premature and too late. Neither defense is decisive of the merits.

H. Demanded "Administrative Remedies" Refused by Respondents.

In January, 1948, more than six years ago, administrative hearings were demanded by certain shareholders of petitioner. (See Appx. p. 92; 14 F. R. D. 273, at 281.)

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[20]Brief for Appellants No. 687, October Term, 1946, page 28, IA: "Judicial relief is not available until appellees have exhausted their administrative remedy."

[21]Answer of Federal Savings and Loan Insurance Corporation, filed June 4, 1951: ". . . this action against this defendant is barred by the statutes of limitations . . ."

Respondents refused and denied such demands upon the grounds that all issues were then pending before the Court below. (See Appx. pp. 92-94.)

Years passed. Statutes of limitation expired, and in September of 1949, more than three years after the seizure, respondents then set (on no one's request) the administrative hearing they had previously refused and denied.

When enjoined from then holding the administrative hearing they had previously refused, respondents appealed and attacked the jurisdiction of the Court—the Court with which they had filed their own accounting, which had appointed their own attorney as the Court's special master, and to which special master's appointment they had signed their express written consent[22] without any qualification or objection whatsoever. Discussing such former appeals, the Court of Appeals said:

> ". . . [this] litigation . . . has previously been before this Court and finally disposed of in Home Loan Bank Board, *et al.* v. Mallonee, *et al,* 196 F. 2d 336, and Fahey, *et al.* v. O'Melveny & Myers, *et al.,* 200 F. 2d 420; cert. denied 345 U. S. 952, rehearing denied 345 U. S. 978. This Court there determined that the District Court was without jurisdiction of the subject matter of either of said consolidated actions . . .
>
> "In view of this Court's previous determination that the said consolidated actions present no justiciable controversy within the jurisdiction of the Federal Court, it necessarily follows that the District Court was and is without authority to proceed in these said consolidated actions or either of them . . .

[22]See Signature Plate opposite page 4.

> ". . . the aforesaid special master was appointed in the said consolidated proceedings to perform functions which it has now been determined were beyond the power of the District Court to undertake. The master was originally appointed . . . to supervise the accounting which the District Court ordered said Ammann to make to Long Beach . . ."

The only reason given why a contested accounting between a Federal conservator and the depositors whose savings he seized should "present no justiciable controversy within the jurisdiction of the Federal Court," and be "beyond the power of the District Court to undertake" is an alleged "failure to exhaust administrative remedies" *before* filing action for the accounting.

I. The Action for an Accounting May Be Filed and Held by the Court, Pending Completion of Administrative Proceedings.

The constitutional authority of a United States Court does not depend upon either administrative action or refusal to act.

"Exhaustion of administrative remedies" affects only the power of the Court to proceed, not its jurisdiction. Some Court must decide whether there actually was an administrative remedy and whether the remedy has, or has not, been exhausted. Such decision of itself is an exercise of jurisdiction.

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 95 L. Ed. 912 (1951), the Court said at page 248 of U. S.:

> "The judgment was reversed by the Court of Appeals . . . on the ground that the District Court was without jurisdiction.

". . . Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has . . .

". . . *We think a direction to dismiss for want of jurisdiction was error and that it should not stand as a precedent.*" (Emphasis added.)

See also:

Bell v. Hood, 327 U. S. 678, 90 L. Ed. 939 (1946), at p. 682 of U. S.;

Binderup v. Pathe Exchange, 263 U. S. 291, 68 L. Ed. 308 (1923), at p. 305 of U. S.

Plaintiffs Shareholders' Protective Committee, unable to obtain demanded receipts for their seized $26,000,000.00 of uncounted cash, bearer bonds, etc., filed immediate action for an accounting and for injunction to prevent transfer and dissipation of their seized uncounted cash and bearer securities and for preservation of the only accounts, books, and records in existence itemizing the seized $26,000,000.00. (14 F. R. D. 273 at 280; see Appx. p. 14.)

Respondent conservator was served[28] with summons and restraining order within the district of the United States District Court at Los Angeles, where the assets were seized, plaintiff depositors resided, and petitioner Association's business and premises are located.

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[28]332 U. S. 245, at 247.

Petitioners complaint attacked the seizure as a violation of the United States Constitution, as beyond statutory or any authority of respondents, as malicious, capricious, arbitrary and vindictive.[24]

The Court of Appeals has now (1953) held that such:

> ". . . actions present no justiciable controversy within the jurisdiction of the Federal Court, . . ."

If the Court of Appeals intends to hold that no justiciable controversy can be filed until administrative remedies have been exhausted, this Supreme Court, and other panels of the same Court of Appeals, have repeatedly held otherwise. Such holdings of the Court of Appeals are in direct conflict wth the United States Supreme Court decisions of:

Far East Conference v. United States, 342 U. S. 570, 96 L. Ed. 576 (1952), wherein the Court said at page 576 of U. S.:

> "Having concluded that initial submission to the Federal Maritime Board is required, we may either *order the case retained on the District Court Docket pending the Board's action* [citing authorities], or order dismissal of the proceeding brought in the District Court . . ." (Emphasis added.)

General Amer. T. Car Corp. v. El Dorado Term. Co., 308 U. S. 422-433, 84 L. Ed. 261 (1940), wherein the Court said at page 433 of U. S.:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Com-

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[24]See *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, page 247, 91 L. Ed. 2030 (1947), for summarization of plaintiffs' complaint by Mr. Justice Jackson and *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, for denial of prohibition.

> mission, was involved, the court should have stayed its hand pending the Commission's determination . . . There should not be a dismissal, but, as in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916, ***supra,*** the cause should be held pending the conclusion of an appropriate administrative proceeding. ***Thus any defenses the petitioner may have will be saved to it.***" (Emphasis added.)

This holding was reaffirmed in:

> *El Dorado Oil Works v. United States,* 328 U. S. 12, 90 L. Ed. 1053 (1946).

United States of Amer. v. I. C. C., 337 U. S. 426, 93 L. Ed. 1451 (1949), wherein Justice Frankfurter said at page 464 of the U. S.:

> ". . . He may begin by filing his suit in court and ask the court to hold the case until he has obtained an administrative determination from the Commission. There is no jurisdictional bar to such a procedure . . . Cases . . . have clearly recognized that there is jurisdiction to hold the case and this procedure has been suggested in a number of them . . . [citing authorities] . . ."

Thompson v. Texas Mexican R. R. Co., 328 U. S. 134, 90 L. Ed. 1132 (1946), wherein the Court said at page 151 of the U. S.:

> "Thus, however the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved . . . The judgment will be reversed and the cause ***remanded*** so that ***the case may be held pending the***

conclusion of appropriate administrative proceedings." (Emphasis added.)

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 319 (1946), reversing a dismissal for failure to exhaust administrative remedies, the Court said at page 568 of the U. S.:

> ". . . The dismissal of the cause should therefore be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding."

and also in direct conflict with:

S. S. W. v. Air Transport, 191 F. 2d 658, (C. C. A. D. C., 1951), wherein the Court said at page 664:

> ". . . The District Court should retain jurisdiction of the antitrust suit while appellant seeks his remedies from the Board . . . The District Court, which will meanwhile have retained jurisdiction of the antitrust suit, will have the benefit of these proceedings in determining the issue of antitrust violation . . ."

In *Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63 (C. C. A. 9, 1949), wherein the Court said at page 66:

> ". . . Trans-Pacific was under the jurisdiction of the Board, and the district court had no power to interfere. The District Court of Hawaii therefore had no jurisdiction to proceed, *but should have held the cause in abeyance until the Board made a primary determination* . . ." (Emphasis added.)

J. There Were No Indispensable Parties.

Alleged absence of respondent Bank Board from the territory of the United States District Court at Los Angeles has no affect on the judgment that respondent conservator account.

The Bank Board itself, by its Order No. 388, required respondent conservator to account *with that Court.*[25]

The Bank Board made a general appearance by the filing of a certified copy of its own resolution with the Clerk of that Court.

The District Court so found (14 F. R. D. 273 at 305), and the Court of Appeals said at 196 F. 2d 336, at page 351:

> "The General Appearance Issue."
>
> ". . . the lower court formally found . . . that in January of 1948 the (then) Home Loan Bank Board . . . made a 'general appearance' in this litigation by filing its Order No. 388 . . .
>
> ". . . we do not regard the issue of effective service (or non-service) on Fahey or members of Administration as controlling . . ."

The right to sue the local seizing agent without necessity for joining the Washington, D. C. superior has been repeatedly approved, both by the Court of Appeals for the Ninth Circuit, and the United States Supreme Court. See:

Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231 (1949), (affirming C. C. A. 9); and

Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95 (1947), (reversing C. C. A. 9).

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[25]For full text of Order No. 388 see page 15 of Appendix.

K. The Orders Appealed From Are Not Final or Appealable. The Court of Appeals Is Without Jurisdiction.

The jurisdiction of the Court of Appeals is wholly statutory. Title 28, United States Code, Section 1291, authorizes appeals only from final orders (with exceptions of no concern here). F. R. C. P. 54(b) limits appealability of interim orders to those to which the District Court affixes its certificate, expressly determining:

(1) That there is no just reason for delay, and

(2) Directing the entry of judgment.

The United States District Court not only refused to make such certification but expressly ruled that the orders were not appealable. Each of the orders appealed from provide:

> "This is an interim order and *is not a final determination* of the issues material to the claim for fees for said Special Master as contemplated by Rule 54(b) F. R. C. P., and *the court reserves the power to modify, alter or amend* this order at any time." (Emphasis added.) [Appeal 12575, R. 125; Appx. pp. 101, 106, 111.]

Without even mentioning either F. R. C. P., Rule 53 or 54(b), the Court of Appeals holds any withdrawal of funds in Court "upon which a lien is claimed" is "final and appealable."

Thereby F. R. C. P., Rule 53(a) which provides:

> ". . . The compensation to . . . a master shall be . . . charged upon such of the parties or paid out of *any* fund or subject matter of the action, which is in the custody and control of the

court as the court may direct . . ." (Emphasis added.)

is repealed.

F. R. C. P. 54 (b) which authorizes the Court to reserve until final judgment apportionment of master's fees among the parties, is likewise repealed.

In *Lyman v. Remington Rand, Inc.*, 188 F. 2d 306 (C. C. A. 2, 1951), the Court said at page 307:

> ". . . The master filed his report . . . recommending a judgment of $940,380.36, . . . the court awarded him a fee of $10,000, and directed the defendant to pay it 'forthwith'—the payment to be included in the taxable costs, if the defendant eventually prevailed . . . The master appealed from this order . . . and the only question is whether it was 'final.'
>
> ". . .
>
> "(2, 3) Before the amendment of Rule 54(b) it would have been. [Citing cases] . . . and, save for Rule 54(b), we should have jurisdiction . . . Nevertheless, the order is within that Rule, as now amended, and is not final in the absence of a certificate by the court for which it provides . . . But upon this record the present appeal must be dismissed."

This rule has been uniformly followed.[26]

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[26] *Dickinson v. Petroleum Conversion*, 338 U. S. 507, 94 L. Ed. 299 (1950); *Republic of China v. American Express*, 190 F. 2d 334 (C. C. A. 2, 1951); *Flegenheimer v. Manitoba Sugar Co.*, 182 F. 2d 742 (C. C. A. 2, 1950); *R. F. C. v. Katz*, 156 F. 2d 215 (C. C. A. 9, 1946); *Lack v. Western Loan & Bldg. Co.*, 146 F. 2d 852 (C. C. A. 9, 1945), cert. den. 324 U. S. 877, 89 L. Ed. 1429 (1945); *Kam Koon Wan v. E. E. Black, Ltd.*, 182 F. 2d 146 (C. C. A. 9, 1950); *Kuly v. White Motor Co.*, 174 F. 2d 742, (C. C. A. 6, 1949); and *Prickett v. Consolidated Liquidating Corp.*, 180 F. 2d 8 (C. C. A. 9, 1950).

The opinion of the Court of Appeals is not only erroneous but is also beyond the appellate jurisdiction of that Court.

Conclusion.

If public faith in the integrity of our Government is to survive, the depositors' charges of fraud, falsification of records, and misappropriation of their $26,000,000.00 of seized uncounted savings must be tried.

Respondents' attempted accounting was rejected as insufficient by the United States District Court.

The Court of Appeals' opinion prevents vindication of respondents if they are innocent, or surcharge if they are guilty.

Such evasion either permits guilty public officials to retain the fruits of their frauds, or leaves honest officials under a lingering cloud of doubt. Neither result should receive Supreme Court approval.

Certiorari should be granted.

Respectfully submitted,

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and

WYCKOFF WESTOVER,
Attorney for Petitioner Mallonee, et al., (Shareholders' Protective Committee).

Appendix Reference.

To prevent repetition in the several petitions for certiorari, a combined appendix by certain petitioners is filed herewith, bound as a separate volume. All appendix references in this petition are to such bound appendix.